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In the Supreme Court of the United States

No. 828.

OCTOBER TERM, 1964.

M. S. CHAMBLISS and C. L. GIBSON,

Petitioners,

vs.

COCA COLA BOTTLING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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TABLE OF CONTENTS.

Opinion Below ---------- 1

Jurisdiction ---------- 1

Questions Presented ---------- 2

Statutes Involved ---------- 3

Statement of the Case ---------- 3

Argument ---------- 4

Conclusion ---------- 6

Appendix:

Opinion of the United States Court of Appeals for the Sixth Circuit ---------- 7

Judgment of the United States Court of Appeals for the Sixth Circuit ---------- 9

Order of the United States Court of Appeals Denying Petition for Rehearing ---------- 9

Pertinent Tennessee Statutes ---------- 10

Pertinent Portion of the Securities Exchange Act of 1934 ---------- 11

TABLE OF AUTHORITIES.

Cases.

Blank v. Bitker, 135 F. 2nd 962 5

Erie v. Tompkins, 304 U. S. 64 4

Fairhope Fabrics v. Mohawk Carpet Mills, 140 F. Supp. 313 5

Hale v. Campbell, 40 F. Supp. 584 5

Hooper v. Mountain States Securities Corporation, 282 F. 2d 195, cert. den., 365 U. S. 814 ..... 2, 4, 5

J. I. Case Co. v. Borak, 377 U. S. 426 4

Republic of Peru, Ex Parte, 318 U. S. 578 5

Spearman v. Sterling S. S. Co., 171 F. Supp. 287 5

Statutes.

TCA 20-220 ..... 4, 10

TCA 48-923 10

TCA 48-934 4

TCA 48-1602(H) 11

15 U. S. C. § 78aa 3, 4, 11

28 U. S. C. § 1254(1) 2

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The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 28, 1964.

OPINION BELOW.

The opinions of the District Court for the Eastern District of Tennessee, Southern Division are not reported. (See Court of Appeals Appendix 19a and 21a, of which nine extra copies are filed herewith.) The opinion of the Court of Appeals for the Sixth Circuit is reported at 337 F. 2d 950, and is appended hereto at page 7.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 28, 1964, and the order denying a rehearing was filed December 8, 1964. Copies

thereof are appended to this petition in the Appendix at page 9. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

In a diversity action alleging violations of the Tennessee Securities Law of 1955 in Tennessee and violations of the Securities Exchange Act of 1934 by acts or transactions in Tennessee, the respondent, prior to answer or motion, took depositions of a plaintiff and an intervenor. The respondent then filed a motion to quash the service, and dismiss the suit for want of personal jurisdiction. The District Court granted respondent's motion to dismiss. The Court of Appeals affirmed the District Court's action in granting respondent's Motion to Dismiss.

The questions presented are:

1. Did the respondent make itself amenable to action in the district wherein this action was instituted by acts or transactions constituting violation of the Securities Exchange Act of 1934 in that district?

2. Did the respondent make itself amenable to action in the district wherein this action was instituted by acts or transactions in that district constituting violation of the Tennessee Securities Act of 1955 in that district?

3. Did the respondent make itself amenable to action by taking depositions for general purposes?

4. Was the decision of the Court of Appeals in conflict with the opinion and decision in *Hooper vs. Mountain States Securities Corporation,* 282 F. 2d 195 in which certiorari was denied in 365 U. S. 814?

STATUTES INVOLVED.

The pertinent portions of the Tennessee Securities Act, of the Tennessee Code Annotated relating to service on out-of-state corporations, and of the Securities Exchange Act of 1934 (15 U. S. C. § 78aa) are set forth in the Appendix at pp. 10-12.

STATEMENT OF THE CASE.

Respondent Coca Cola Bottling Corporation, in carrying out a merger and recapitalization, sent agents to Tennessee and also hired agents in Tennessee to assist in negotiations to secure preferred stockholders in Tennessee (and adjacent Georgia) to acquiesce in a recapitalization which divested the preferred stockholders of all equity rights and converted them to debenture holders. A class action was filed in the United States District Court for the Eastern District of Tennessee by aggrieved preferred stockholders, based on diversity of citizenship and amount, and violations of the Tennessee Securities Act and the Securities Exchange Act of 1934 were alleged. Notice was given by the respondent that the depositions of the plaintiffs would be taken. Petitioners here intervened. The respondent thereupon filed a notice to also take the deposition of an intervening petitioner, C. L. Gibson. Depositions were taken. Thereafter (on the same day) respondent filed its Motion to Dismiss for want of personal jurisdiction. The District Court dismissed for want of personal jurisdiction. The Court of Appeals affirmed the District Court.

ARGUMENT.

I.

The District Court and the Court of Appeals held that the respondent was not amenable to action in Tennessee for violations in Tennessee of the Securities Exchange Act of 1934, despite the opinion of this Court in *J. I. Case Co. v. Borak,* 377 U. S. 426; and the provisions of 15 U. S. C. A. § 77aa, which indicate that an action for violation of the Act may be brought "in the district wherein any act or transaction constituting the violation occurred." See *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (5th Circuit), where the Fifth Circuit held that the corporation was amenable to the action because a long distance telephone call from Texas to Alabama was an occurrence in Alabama, the forum.

II.

The District Court held that because the respondent had not consented to be sued in Tennessee, nor appointed an agent for service of process, it could not be served in Tennessee, since respondent was not doing business in Tennessee so as to be subject to service of process. This, in effect, is a holding that a violation of the Tennessee Securities Act by an out-of-state corporation does not make it *answerable* to process unless either (1) the corporation consents to suit, (2) the corporation has complied with the law by appointing an agent for service of process, or (3) the "doing business" involved is in the ordinary course of business of the corporation. This is contrary to Tennessee law, TCA 20-220, and 48-934, and consequently, contrary to the law laid down by this Court in *Erie v. Tompkins,* 304 U. S. 64.

III.

The District Court held that personal jurisdiction could *only* be waived by a failure to raise the question in a responsive pleading or motion before pleading, and specifically was not waived by taking the deposition of the opposing party before motion or pleading. This is contrary to the law, but was not even discussed by the Court of Appeals. This is not in accord with the Federal Rules of Civil Procedure as heretofore interpreted. *Spearman v. Sterling S. S. Co.*, 171 F. Supp. 287; *Fairhope Fabrics v. Mohawk Carpet Mills*, 140 F. Supp. 313; *Blank v. Bitker*, 135 F. 2nd 962; *Hale v. Campbell*, 40 F. Supp. 584; *Ex Parte Republic of Peru*. 318 U. S. 578.

IV.

The Court of Appeals held correct the dismissal of this action despite the fact that the respondent sent agents into Tennessee and employed agents in Tennessee to promote the exchange of preferred stock for debentures having a value of approximately two million dollars in violation of the Securities Exchange Act of 1934.

As a consequence this decision is in conflict with that in *Hooper v. Mountain States Securities Corporation*, 282 F. 2d 195.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided October 28, 1964.)

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, McCREE, District Judge.

PER CURIAM. This appeal was brought by two intervening plaintiffs when the original plaintiffs in this class action declined to prosecute the appeal. The intervening plaintiffs appear to have identical interests with the original plaintiffs and questions of fact and law in common. Although no formal order granting intervening plaintiffs' motion to intervene was ever entered, plaintiffs appear to have been proper parties for such intervention (Fed. R. Civ. P. 24(a) (2) and 24(b)).[1]

---

[1] "Rule 24. INTERVENTION

"(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action:

* * *

"(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;

* * *

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(a) (2) and 24(b).

Further, in considering and deciding intervening plaintiffs' motion to reconsider the order quashing service, the court below apparently treated them as parties. Under these circumstances we will regard the District Judge's action as an implied grant of leave to intervene, and hence deny the motion to dismiss the appeal.

The appeal sought is from the dismissal of the above-styled action. The jurisdictional issues in this litigation were previously passed on by this court in another appeal. *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (C.A. 6, 1963).

The District Judge who granted the motion to dismiss (dealing with a statute newly cited by plaintiffs in the instant case) held:

> "* * * Section 48-923 T.C.A. requires 'doing business' in this state by a foreign corporation to sustain substituted service of process on the foreign corporation, this issue was fully dealt with in the former action between the same parties, with the finding of this Court to the effect that the defendant was not doing business in Tennessee so as to be subject to service of process in this state being sustained by the Court of Appeals in the case of Smartt vs. Coca-Cola Bottling Corporation, 318 F.2d 447. Uncontroverted affidavits as well as the deposition of the plaintiff establish that no new facts have developed with respect to the defendant's doing business in Tennessee since the dismissal of the former action.
>
> "The Court is accordingly of the opinion that * * * the defendant's motion to quash the service of process herein and dismiss this suit for lack of jurisdiction over the defendant should be sustained."

On consideration of the briefs and oral argument this court finds that the District Judge was correct.

Affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered October 28, 1964.)

BEFORE: WEICK, Chief Judge, EDWARDS, Circuit Judge, and McCREE, District Judge.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Intervening Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR REHEARING.

(Entered December 8, 1964.)

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and McCREE, District Judge.

On consideration of intervening plaintiffs-appellants' petition to rehear, the same is hereby DENIED.

PERTINENT TENNESSEE STATUTES.

Tennessee C. A. 20-220. *Foreign corporations subject to actions.*—Any corporation claiming existence under the laws of the United States or any other state, or of any country foreign to the United States, or any business trust found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to be sued, so far as relates to any transaction had, in whole or in part, within this state, or any cause of action arising here, but not otherwise. Any such corporation or trust having any transaction with persons, or having any transaction concerning any property situated in this state, through any agency whatever, acting for it within the state, shall be held to be doing business here within the meaning of this section.

Tennessee C. A. 48-923. *Doing business as appointment of agent to receive process.*—Any foreign corporation who shall do business in Tennessee without designating an agent upon whom process may be served in suits brought against such corporation in the courts of this state as required by law, and who shall make use of the privilege extended by law to foreign corporations to do business in this state upon domestication, shall be deemed thereby to constitute the secretary of state of this state as its agent, for the acceptance of service of process in any civil action brought by any person, firm, corporation or other legal entity, against such undomesticated foreign corporation, arising out of such unauthorized business done in this state, and to that end the use of the privilege so extended to foreign corporations upon domestication by an undomesticated foreign corporation shall be treated as an agreement on the latter's part that such service of process shall have the force and validity of personal service on it

within the jurisdiction of this state and the county of the action now pending or hereafter instituted.

Tennessee C. A. 48-1602 (H). "Sale" or "sell" shall mean every sale or other disposition of a security or interest in a security for value, and every contract to make any such sale or disposition. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value.

PERTINENT PORTION OF THE SECURITIES EXCHANGE ACT OF 1934.

15 U. S. C. § 78aa. *Jurisdiction of offenses and suits.*

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall

be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32 (b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.